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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SIMPSON PAPER (VERMONT) COMPANY,
Petitioner
v.
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
and SIERRA CLUB

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

SUPPLEMENTAL BRIEF FOR PETITIONER

HOWARD E. SHAPIRO
Counsel of Record
GARY D. BACHMAN
MICHAEL A. SWIGER
VAN NESS, FELDMAN & CURTIS
A Professional Corporation
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, DC 20007
(202) 298-1800
Attorneys for Petitioner
Simpson Paper (Vermont)
Company

JEANNE M. VERVILLE
SIMPSON PAPER (VERMONT) COMPANY
1201 Third Avenue
Seattle, WA 98101-3009
(206) 224-5046

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Pursuant to Rule 15.7 of this Court's Rules, petitioner Simpson Paper (Vermont) Company submits this Supplemental Brief addressing the Brief for the United States as Amicus Curiae ("U.S. Br.") filed on June 9, 1993 in response to the Court's order of March 8, 1993 inviting the Solicitor General to submit the views of the United States.

1. The Solicitor General recognizes the importance of the issue presented by observing that "[t]he scope of a

State's power under Section 401 presents issues of substantial importance to the United States, both in enforcing the Clean Water Act and in licensing and permitting of hydroelectric and other projects" (U.S. Br. 9). His contention that this case is not an appropriate vehicle for considering these issues, however, rests upon a misapprehension of the judgment of the Vermont Supreme Court.

2. The state supreme court's judgment did not clearly and expressly indicate that it was "alternatively based on bona fide separate, adequate and independent" [1] determination that the continuous spillage requirement was necessary to ensure compliance with Vermont's dissolved oxygen ("DO") standards. The court instead singled out for discussion the elements in Vermont Water Quality Standards § 3-03 concerning management of the Connecticut River for "water of a quality which consistently exhibits good aesthetic value . . . and recreation (Pet. App. 3a). As demonstrated in Simpson's Reply Brief at 2-3, its decision never linked those requirements with the DO issue, despite the intense contest on that matter throughout the case.

3. The Solicitor General purports to find support for his position in the rulings by the Vermont Department of Environmental Conservation (DEC) and the state trial court (U.S. Br. 10-12). But the issue here is what was decided by the Vermont Supreme Court, a distinction the United States clearly recognizes (U.S. Br. 12-14).[2]

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[1] *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

[2] The government suggests (U.S. Br. 10, n.9) that "there is no occasion in this case to consider whether a state court's affirmance of a state agency's imposition of a condition on a certification under Section 401 might in some circumstances present a question of federal law that is subject to review in this court . . . ." The government's characterization of the question presented (U.S. Br. at (I)), however, is essentially the first question presented by

In fact, the Vermont Supreme Court avoided review of the closely contested DO issue by basing its decision on the "aesthetic" justification.

4. The government's amicus brief is also mistaken in contending that "even if this Court were to grant review in this case and hold that a State may not consider 'aesthetic' factors unrelated to measurable water quality criteria, both the DEC decision and the Vermont Supreme Court's judgment affirming it would be unaffected" (U.S. Br. at 15). Because the Vermont Supreme Court has clearly ruled that a spillage requirement can be properly based on subjective aesthetic factors, its judgment, unless reversed by this Court, could eliminate Simpson's opportunity to seek revision of the § 401 certificate based upon empirical studies and plans showing that appropriate DO levels can be maintained with a reduced spillage requirement.[3] The "aesthetic requirement," as construed and affirmed by the Vermont Supreme Court, would stand as a barrier that could not be breached by any evidence, however strong, regarding measurable water quality conditions. Thus this case is not advisory, but concrete and adversary because a reversal could affect Simpson's rights to seek a revision of its § 401 certificate.

5. The United States suggests that the asethetic requirement is so unclear as to be unworthy of review (U.S. Br. 15-16). That position, however, is contrary to the

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Simpson in its petition. That question goes to the scope of state authority under § 401 of the Clean Water Act and clearly presents a federal question within the meaning of 28 U.S.C. 1257.

[3] In opposing Simpson's assertion that it was entitled to *de novo* review, the DEC in its brief to the Vermont Supreme Court suggested that Simpson would be free to petition the DEC for an amendment to the continuous spillage requirement once Simpson's appeal was denied, based on "any new evidence it considers germane. . ." Joint Brief of the Appellees at 21 & n.11.

State's own view that *the requirement was, as a matter* of law, properly sustained by the Vermont Supreme Court. Vermont clearly contends that "the challenged certification must still be upheld as a valid application of Vermont's power to apply its non-quantitative water quality standards—specifically, that portion of the standards that require 'water of a quality which consistently exhibits good aesthetic value . . . and recreation' " (Jt. Br. in Op. 9-10). Eschewing speculation of the kind set forth in the U.S. amicus brief, the Vermont DEC stands its legal ground. It does not even hint that the aesthetic requirement is based on aesthetic factors related to measurable water quality criteria. Nor could it so contend. There is no evidence in the record linking water quality to aesthetic factors. The judgment of the Vermont Supreme Court rests solely on the legal conclusion that non-quantitative aesthetic factors are valid under § 401. The judgment thus presents a clear question of law as to whether such factors are properly within the scope of state certification authority under § 401.

6. Finally, the Solicitor General errs in his statement that the minimum flow requirement involved in this case "has received a preliminary endorsement by FERC" (U.S. Br. 16). First, there has been no "endorsement" through any order, preliminary or otherwise, by the Commission or by any official exercising decisional authority delegated by the Commission. Under FERC's precedents, the Environmental Assessment cited by the government is only a staff evidentiary document that never itself becomes a license condition or final order.[4] Second, there is pending before FERC's Staff a request by Simpson filed December 14, 1992 seeking a revision of the evidentiary EA which the government mistakenly treats as an agency deter-

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[4] *See e.g., Montana Power Company and Granite County, Montana,* 62 FERC ¶ 61,166 at p. 62,143-144 n.44 (1993); *Pacific Gas & Electric Company,* 59 FERC ¶ 61,098 (1992).

mination. That request is based on (1) three years of monitoring data which show the spillage is not necessary to protect DO, and (2) Simpson's revised water quality management plan, which is designed to ensure DO levels never drop below state standards.

7. Ultimately, the issue here is not, as the Solicitor General appears to contend, whether there is a conflict with FERC action (U.S. Br. 16). The issue concerns which forum, state or federal, has statutory responsibility for determining when aesthetic and other non-water quality conditions should be imposed on the operations of hydroelectric facilities. The government concedes (U.S. Br. 17, n.14) that "if the court were to grant review, it . . . would be relevant to consider the interaction of Section 401 and the statutory provisions governing FERC's licensing authority." That interaction is at the heart of this case. The issue is whether hydroelectric operations are to be governed by FERC's comprehensive balancing of all factors under the Federal Power Act, or by determinations of single-purpose state agencies.

In this regard, the Court may wish to postpone action on this petition for a writ of certiorari until it can fully assess its relationship to the petition for a writ of certiorari in *PUD No. 1 of Jefferson County and City of Tacoma v. State of Washington, Department of Ecology et al*, Petition for a Writ of Certiorari to the Supreme Court of Washington, No. 92-1911, filed June 1, 1993. The government acknowledges in its brief (U.S. Br. 17 n.15), that the *Tacoma* case presents issues substantially similar to those presented by this case.

For the reasons stated in the Petition for a Writ of Certiorari, Petitioner's Reply Brief and this Supplemental Brief, the Petition for a Writ of Certiorari should be granted. Alternatively, the Court may wish to postpone action on the Petition and consider the case together with the petition in No. 92-1911.

Respectfully submitted,

HOWARD E. SHAPIRO
Counsel of Record
GARY D. BACHMAN
MICHAEL A. SWIGER
VAN NESS, FELDMAN & CURTIS
A Professional Corporation
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, DC 20007
(202) 298-1800
Attorneys for Petitioner
Simpson Paper (Vermont)
Company

JEANNE M. VERVILLE
SIMPSON PAPER (VERMONT) COMPANY
1201 Third Avenue
Seattle, WA 98101-3009
(206) 224-5046

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